IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 593 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

and

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SATHWARA SURESHKUMAR GANGARAM

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 593 of 1993

MR NITIN M AMIN for Petitioner No. 1

MR KP RAVAL APP for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

and

MR.JUSTICE D.P.BUCH

Date of decision: 27/12/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused-Sathwara Sureshkumar Gangaram has challenged in this appeal the impugned judgment and order of conviction and sentence dated 30.4.1993 passed by the learned Addl. Sessions Judge, Mehsana in Sessions Case No.159 of 1992 whereby the learned Judge convicted him for the offence under Section 302 of IPC and sentenced him to suffer life imprisonment and to pay fine of Rs.200/- in default to further undergo S.I. for 3 months. However, he has acquitted the accused for other offences punishable under Section 409A and 201 of IPC by giving benefit of doubt by that very order.

#. The appellant-accused along with other accused persons tried for the offence under Section 302 of IPC for committing murder of his wife deceased-Bhavna in the mid night hours at 2.00 p.m. of 19.3.1992. All the four accused were also tried for the offence under Section 498-A of IPC. All the four accused were also tried for the offences punishable under Section 201 of IPC for destroying evidence.

#. As per the prosecution case the present appellant-accused belongs to `kadia'(mason) community. The complainant-Naranbhai Revabhai PW-2 Ex.41 is the father-in-law of the appellant-accused. He had two daughters; (1) Harshida and (2) deceased-Bhavna. Harshida got married to Satwara Ramesh Gangaram, accused No.2, real brother of the present appellant accused. He was harassing his wife-Harshida, therefore, finally they got separated with divorce on 6.12.1990. Deceased-Bhavna got married with the present appellant-accused. At that time she was school going, therefore, she was staying with her parents. After the divorce of Harshida, on the assurance of the present accused and other three accused, complainant-Naranbhai sent his second daughter-Bhavna at her in-laws place on the condition that she will not be harassed. However, present appellant-accused sold away the ornaments of his wife deceased-Bhavna and warned her not to disclose the same to her parents and to tell them that they were lost. However, she told her parents the truth. Therefore, she was subjected to mental as well as physical cruelty by the appellant-accused. Occasionally, he was taking away money also.

#. On 19.3.1992 at about 1.30 p.m. the complainant received a telephonic message from Prahladji, elder

brother of the present appellant-accused informing that Bhavna received burn injuries and she has been admitted in Civil Hospital, Ahmedabad, therefore, they may come immediately. Thereupon, without wasting any time complainant-Naranbhai reached Ahmedabad Civil Hospital in the afternoon on 19.3.1992 along with his wife Savitaben Naranbhai PW-3 Ex.44 and his brother. Bhavna was in ward Ex-5. They inquired from Bhavna that how she received burn injuries. But in the presence of the appellant-accused and his other family members she did not give any reply to them. On that night i.e. on 19.3.1992 complainant-Naranbhai along with his brother Mafatlal came back to their village Ladol and on the next day of morning i.e. on 20.3.1992 he along his brother-Mafatlal and two other brothers-in-law went to Mehsana Police Station and gave a written complaint Ex.55 against present appellant and other accused for the offence under Section 498-A and 114 of IPC. The said complaint was drafted by his brother-Mafatlal. After registering the FIR police started investigation. Mr.Rasiklal Nandasania, PSI, PW-9 Ex.67, who investigated the case, went to Ahmedabad and recorded the statement in the form of dying declaration of deceased-Bhavna on 20.3.1992. Unfortunately, though the said dying declaration made by deceased-Bhavna, which was very much there on record, but for some or the other reason it could not be exhibited and brought on record, wherein she has clearly stated that she was burned alive by her husband-present appellant accused. When it is not exhibited then no importance can be attached to it and we have not made any use of it against the appellant-accused.

#. At this stage, it may be stated that when deceased-Bhavna brought to the Civil Hospital in the morning at about 8.00 to 8.30 a.m., Dr.Kirit Patel Ex.61 page 105 examined her. She got 60% burn injuries on her chest, both hands, legs, front and back portion of the body as well as her private part. At that time she was conscious. He had produced case papers Ex.63. In the case papers at Ex.63 it is mentioned that in the morning when she was preparing tea, at that time accidentally she caught fire on her petty-coat and thereby received burn injuries.

#. Executive Magistrate Mr.Pravin Limbachia PW-1 Ex.37 received yadi Ex.39 from police on 19.3.1992 for recording dying declaration of Bhavna at Civil Hospital when he was recording another dying declaration in the Civil Hospital itself. In question and answer form dying declaration of Bhavna was recorded at Ex.68 at about 9.00

a.m. wherein she has alleged to have stated that when she was preparing tea in the morning accidentally she caught fire on polyester saree put on by her and because of that she received burn injuries.

#. As stated earlier, on the complaint lodged by complainant-Naranbhai, on the next day of incident i.e. on 20.3.1992, police came to Civil Hospital at Ahmedabad and started investigation and recorded the statement in the form of dying declaration of deceased-Bhavna, which is not exhibited in this case. On the next date i.e. on 21.3.1992 at about 1.15 p.m. once again the I.O., Mr.Nandasania Ex.67 gave the paper and pen to deceased-Bhavna to narrate the real version and accordingly in her own handwriting she had made her last dying declaration, at about 1.15 p.m. at Ex.45, clearly involving her husband the present appellant-accused. Thereafter, she died on 30.4.1992 i.e. after a period of more than 41 days of the incident because of the burn injuries received by her during the incident in question.

#. The prosecution examined; (1) Dr.Kirit Kumar Patel PW-7 Ex.67 who had produced case papers at Ex.63 (2) Pravin Limbachia, Executive Magistrate PW-1 Ex.37, who recorded the first dying declaration of deceased-Bhavna at 9.00 a.m. on 19.3.1992, (3) Mr.Rasiklal Nandasania, I.O. PW-9 Ex.67 to whom deceased-Bhavna gave her written dying declaration in her own handwriting on 21.3.1992 which is at Ex.45. In addition to it, the prosecution examined Naranbhai Revabhai Revabhai-complainant, father of deceased-Bhavna PW-2 Ex.41 and Savitaben Naranbhai-mother of deceased-Bhavna PW-3 Ex.44.

#. Considering the evidence of the prosecution witnesses and the three dying declarations, which were on the record, the learned Trial Judge came to the conclusion that the prosecution has failed to prove its case against remaining accused No.2 to 4 for the offences under Section 302 of IPC or the offence under Section 498-A read with Section 34 of IPC and accordingly by his judgment and order acquitted them. However, the learned Judge relied upon the dying declaration Ex.45 and found the appellant-accused guilty for the offences under Section 302 of IPC and accordingly sentenced him to suffer life imprisonment and to pay fine of Rs.200/=. However, he has acquitted the accused for the offences under Section 498-A as well as 201 of IPC by giving benefit of doubt on the ground that there is no reliable evidence to prove those charges.

##. Learned counsel Mr. Nitin Amin appearing for

appellant-accused vehemently submitted that in the instant case learned Judge has committed grave error in convicting the appellant-accused on the sole dying declaration Ex.45 of deceased-Bhavna. He submitted that it is very much doubtful that the said dying declaration was made by the deceased-Bhavna herself. He also submitted that immediate version of deceased-Bhavna when she was examined by Doctor and Executive Magistrate was totally different. She had stated before them that while preparing tea in the morning accidentally she caught fire and because of that she received burn injuries. He submitted that the third dying declaration Ex.45 was made by deceased-Bhavna at the instance of her parents who are very much present there in hospital for about two days. He, therefore, submitted that the said dying declaration should be discarded, more particularly, when there is no corroboration from FSL report and the doctor's evidence regarding smell of kerosene on the clothes put on by the deceased at the time of incident.

##. It is true in the case papers Ex.63 it is stated that deceased-Bhavna received burn injuries accidentally while preparing tea in the morning. It is also true that Dr.Kirit Kumar Ex.61 has stated in his evidence that when he examined the deceased there was no smell coming from the body of the deceased-Bhavna. However, he clearly stated in his evidence that when he examined Bhavna she had 60% of burns on her entire body i.e. on front and back of the chest, both hands, both legs and on her private part. However, postmortem notes shows that there was no burn injury on her fingers and palms. Merely because in the case papers the doctor stated that how she received injuries could not be sufficient because nowhere he had stated in his evidence that she gave that history. Ordinarily the history is given in the case papers by the relatives of the patient and not by the patient himself or herself. At that time along with deceased-Bhavna, her parents were not present and the appellant-accused as well as his other family members, who are co-accused were present, therefore, no much importance can be attached to it and in our considered opinion, the learned Judge has not given much importance to it. This brings us to the dying declaration made by the deceased-Bhavna at 9.00 a.m. before Executive Magistrate Pravinbhai Limbachia Ex.37 and dying declaration at Ex.40 shows that after she was put at blaze she must have been completely frightened and because of that threat received by her from the appellant, parents of the accused and others, she could not have dared to disclose the real story before the Executive Magistrate in presence of them. If we read the dying declaration Ex.40 closely then she has stated that

at the time of incident all were sleeping in the house and the incident happened at about 5.00 a.m. and when asked how the incident happened she stated that her husband had to go to her brother-in-law's place early in the morning to Ahmedabad, therefore, she was preparing tea for them early in the morning and when she got up to get the tea and sugar boxes all of a sudden she caught fire on the polyester saree put on by her. This very fact shows that the dying declaration was not true. If all the persons were sleeping then where was the question of her preparing tea for her husband. No doubt it is true that Executive Magistrate Pravinbhai stated in his evidence before the court that while recording dying declaration of deceased-Bhavna he had sent all her relatives outside the room but we are not prepared to place much reliance on it in view of the subsequent dying declaration made by her on 21.3.1992 Ex.45 wherein she had clearly explained that she was frightened and she was undergoing the trauma of burning, therefore, in presence of the accused persons she could not have discloses the real story before the Executive Magistrate. In that view of the matter when the learned Judge himself has not placed any reliance upon the dying declaration Ex.40 then we are also not prepared to place any reliance on it.

##. This brings us to the dying declaration made on 21.3.1992 Ex.45. We have seen the original dying declaration which was stated to have been written by the deceased herself. It may be stated that this dying declaration came to be recorded only after arrival of her parents. It is pertinent to note that when she was asked by complainant-Naranbhai about the real incident in the hospital on 19.3.1992 she could not tell the real story to her parents because of the presence of the accused persons. However, on the complaint filed by the complainant on the next day i.e. on 20.3.1992 before the police, on investigation, the I.O. found that she was tried to burnt alive by her husband, the present appellant-accused. Unfortunately, that statement which is in form of dying declaration was not exhibited and brought on record by the Public Prosecutor. However, it seems that the I.O. Mr. Nandasania wanted to be doubly sure, therefore on the next day i.e. on 21.3.1992 he asked the deceased-Bhavna to state the real version in her own handwriting which she had done and that is how final dying declaration of deceased-Bhavna came on record at Ex.45 in which she has fully explained under what circumstances she could not explain the real story earlier either before the Doctor or the Executive Magistrate. Mr.Nandasania, I.O., has cross-examined on this point but nothing substantially came out in his

cross-examination and in absence of any oblique motive suggested against I.O. we do not see any reason not to believe his evidence. We are fully convinced that the said dying declaration at Ex.45 was made by deceased-Bhavna in her own handwriting.

##. We would like to reproduce the dying declaration, in nutshell, which was written by the deceased-Bhavna in her own handwriting Ex.45 as under wherein she stated that:-

> On Saturday, 14th March, 1992 she went to Ladol on the say of her mother-in-law and on last Tuesday she went to Mansa. In spite of that her mother-in-law, father-in-law and her husband quarrel with her. On Wednesday night after seeing movie at about 12.00 mid night he called his mother and quarreled with her and told to go to Ahmedabad otherwise he will kill her. Thereupon, she said that then she may also not spare him. He abused her a lot. Thereafter she told him to sleep and in the morning she will go. But he told her that she may go immediately otherwise she will be killed by him. Thereafter, they went to sleep. It was about 1.00 mid night, again he started quarreling. He brought kerosene tin and steel bowl, sprinkled kerosene and set her fire. Her mother-in-law was standing with quilt. She threw quilt on her. They brought some medicine from nearby medical shop. From the quilt she was shouting that she is dying, but her mother-in-law was threatening her not to shout otherwise neighbours may hear it. On Wednesday they brought doctor, who gave her injection. Thus for three hours she was tortured. She lost consciousness and when she regained consciousness she was forced to say what they say. On that condition only she was shifted to the hospital at Ahmedabad. All throughout she was instructed to state only what they say. She requested them to call her parents. She was told to state that when she was preparing tea in the morning at 5.00 a.m. accidentally she received burn injuries and threatened that otherwise she will not be spared. First they went to her brother-in-law's place at Ahmedabad and then went to Civil Hospital. She asked them to go out of room in hospital but nobody left her alone and that is why she had no opportunity to tell the truth as she was frightened and because of that earlier she made a false statement".

##. The way in which she had narrated everything in her dying declaration on 21.3.1992 shows that third and the last dying declaration made by her was wholly true and reliable. No doubt it is true that there are some contradictions in the evidence of the prosecution witnesses; (1) Naranbhai and (2) Savitaben, but such contradictions are bound to be there in such type of cases as the normal human tendency to say something more than what is exactly happened. However, in our considered opinion such contradictions would not affect the prosecution case when we are fully satisfied with the third dying declaration Ex.45 is rightly relied upon by the learned Judge for convicting the appellant-accused.

##. It is true that FSL report and doctor's evidence rules out the smell of kerosene. But panchnama of scene of offence Ex.53, which was recorded immediately after the incident discloses that there was smell of kerosene on the quilt. It may be that because of some delay in examination no smell of kerosene must have been found in FSL report. It may be that kerosene was sprinkled from small bowl, therefore, also at the time of examination its smell might not have been noticed after a considerable time. But that will not destroy the dying declaration made by deceased-Bhavna. The finding of small steel bowl with the kerosene tin also suggest that kerosene which was poured on her body may not be of large quantity and because of that neither doctor nor FSL must have noticed the smell of kerosene. After all it is an expert evidence and when there is a clear cut evidence in the form of dying declaration of the deceased which was made in a very natural manner, then we would rather prefer to rely upon such evidence than the expert evidence.

##. Having carefully gone through the impugned judgment and order of conviction and the reasons assigned by the learned Judge for convicting the appellant-accused for the offence under section 302 of IPC we are fully convinced that the learned Judge has given solid and cogent reasons for convicting the accused under Section 302 of IPC.

In view of the above discussion, we do not find any substance or merit in this appeal. Accordingly, it fails and is hereby dismissed.

(B.J.Shethna, J.)

(D.P.Buch, J.)

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